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No. 865

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

LEVITT AND SONS, INCORPORATED,

Appellant,

v.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES AND FRANKLIN D. TODD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF OF APPELLANT OPPOSING APPELLEES' MOTIONS TO DISMISS.

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May 31, 1960

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POINT I.

The judgment of the Supreme Court of New Jersey appealed from is a reviewable final judgment.

The judgment of the New Jersey Supreme Court appealed from is a reviewable final judgment in a separate and independent state court proceeding in lieu of prerogative writ determining the jurisdiction of a state administrative agency and the constitutionality of the statute pursuant to which jurisdiction was sought to be exercised.

Because prerogative writ proceedings involving the extraordinary writs of mandamus, prohibition, quo war-

ranto and certiorari often involved wasteful litigation concerning the identity of the proper prerogative writ, cases having been dismissed on final appeal because the complainant had sought the wrong prerogative writ, and because of the discretionary character of prerogative writ proceedings [*Ward* v. *Keenan*, 3 N. J. 298, 303-5 (1949)], the 1947 Constitution of the State of New Jersey contained the following provision in Article VI, Section 5, Paragraph 4:

> "Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary."

This constitutional provision was implemented by the New Jersey Supreme Court by the adoption of a rule, now R. R. 4:88-1 *et seq.*, establishing the procedure to be followed in proceedings in lieu of prerogative writs.

Although the various historic prerogative writs have been replaced in New Jersey by a single proceeding called "a proceeding in lieu of prerogative writ", the relief available is still determined by the substantive law of the historic prerogative writs. See *Ward* v. *Keenan*, *supra*, at 308; *Nolan* v. *Fitzpatrick*, 9 N. J. 477, 485 (1952).

This action was commenced as an action in lieu of prerogative writ under R. R. 4:88-2 in the Superior Court, Law Division. On appeal to the Superior Court, Appellate Division from the dismissal of the action in the Law Division, the Appellate Division decided to consider the appeal as an application for leave to review, under R. R. 4:88-8(b), the action of the Division setting down for hearing the complaints of the individual appellees. R. R. 4:88-8(b) is another section of the rule of the New Jersey Supreme

Court governing "Procedure In Lieu Of Prerogative Writs".

This Court has historically recognized the independent nature of state court prerogative writ proceedings and has consistently held that judgments of the highest state court in such proceedings are final judgments reviewable in this Court when they determine adversely to complainants the jurisdiction of a state administrative agency or an inferior court and the constitutional validity of the applicable statute. *Rescue Army* v. *Municipal Court of the City of Los Angeles*, 331 U. S. 549 (1947); *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8 (1931); *Missouri ex rel. St. Louis B. & M. R. Co.* v. *Taylor*, 266 U. S. 200 (1924); *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30 (1916).

The state court proceedings in this case are strikingly similar to those reviewed by this Court in *Pacific Coast Dairy, Inc. v. Department of Agriculture*, 318 U. S. 285 (1943). In the *Pacific Coast* case, the Supreme Court of California denied an application for a writ of mandamus to prevent a state administrative agency from conducting a proceeding to revoke a milk distributor's license. This Court heard and decided that case on the merits without discussing the finality of the judgment below, although it had previously requested briefs and argument on the question of whether the judgment was final. Supreme Court Journal, October Term 1942, Page 8; 11 U. S. Law Week 3106, col. 2.

Even if this case be viewed as one not involving an independent litigation, nevertheless the judgment appealed from is final and reviewable because nothing more remains to be done except the ministerial act of entering in the Division the order stipulated by all of the parties to the litigation, including the Attorney General of New Jersey as attorney for the Division.

The statutory procedure under which the Division acts, as set forth in N. J. S. A. 18:25-1 *et seq.*, provides for a hearing, the filing of findings of fact on the basis of the evidence produced thereat and the entry of an order requiring a respondent to cease and desist from acts unlawful under the statute and to take such affirmative action "as, in the judgment of the commissioner, will effectuate the purpose of this act, and including a requirement for report of the manner of compliance." N. J. S. A. 18:25-17. Such an order may be enforced by the commissioner in a civil action in the county court to compel specific performance (N. J. S. A. 18:25-19) or may be appealed by a party aggrieved to the county court (N. J. S. A. 18:25-2).

During the pendency of Levitt's appeal in the New Jersey Supreme Court and pursuant to the order of the Supreme Court of New Jersey of November 2, 1959 (Division Motion to Dismiss, Appendix C), the parties entered into a stipulation in the Division waiving hearing and the stating of findings of fact and specifying the terms of an order to be entered in the Division in the event that the Supreme Court of New Jersey determined adversely to Levitt the issues involved in the pending appeal. Motion of Individual Appellees, Appendix pp. 1a-4a. The order provided for in the stipulation is the same as the form of order which the Division would have been entitled to enter under N. J. S. A. 18:25-17 and it constitutes final definitive action by the Division in the proceedings before it. The fact that a respondent might fail to comply with the provisions of such an order, thus warranting subsequent enforcement activities by the Division, does not affect the finality of the order in any respect.

The stipulated order is not comparable to the form of order in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948), relied upon by the Division. The order in that

case provided for negotiation between the parties on various issues in the litigation and, upon failure of agreement in negotiations, for further administrative agency proceedings to result in an order determining such issues. There are no such comparable provisions in the stipulated order in this case and the possibility of subsequent enforcement proceedings does not detract from the finality of the order. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).

Because of the existence of the stipulation providing for the form of order to be entered in the administrative agency, this case is in the same posture of finality as many others which this Court has held to involve final judgments despite the fact that there yet remained to be done the ministerial act of entering judgment in a lower court on remand from the court whose judgment has been appealed. *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U. S. 77 (1958); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); see *St. Louis, Iron Mountain and Southern R. Co.* v. *Southern Express Co.*, 108 U. S. 24 (1883).

The fact that the parties have waived hearing and findings of fact and have stipulated the form of order to be entered in the administrative agency with nothing more to be done in the state administrative agency than to enter the order makes this case identical in form to that involved in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69 (1946), where the case had been tried on pleadings and stipulated facts with a jury having been waived.

POINT II.

The federal question set forth in Point II of the Jurisdictional Statement was timely raised in the court below.

As pointed out at pages 10 and 11 of the Jurisdictional Statement, the federal question discussed in Point II of the Jurisdictional Statement concerning the unconstitutionality of the New Jersey Law Against Discrimination under the due process clause of the Fourteenth Amendment arose in this case for the first time by virtue of the construction put on the statute by the Supreme Court of New Jersey in its opinion. The opinion eliminated the statutory definition in N. J. S. A. 18:25-5(k) of "publicly assisted housing accommodation" used in N. J. S. A. 18:25-4, thereby rendering the subject matter of the prohibition of N. J. S. A. 18:25-4 so vague and indefinite that, by applying the statutory prohibition to Levitt, the court deprived Levitt of its property without due process of law in violation of the Fourteenth Amendment.

To afford the Supreme Court of New Jersey an opportunity to reconsider its ruling in the light of this constitutional infirmity, Levitt, on March 28, 1960, moved for leave to file a petition for rehearing out of time. In its motion Levitt quoted Question 2 set forth in its Notice of Appeal to this Court and pointed out that the principles followed by this Court on review of judgments of the highest courts of the states required such presentation by way of petition for rehearing. In the petition for rehearing accompanying the motion, Levitt argued the unconstitutionality of the statute as construed by that court, urging that the construction which eliminated the definition rendered the term "publicly assisted housing accommodation" vague and indefinite. By order dated April 8, 1960, the Supreme Court

of New Jersey granted Levitt's motion for leave to file the petition for rehearing out of time but denied the petition because no justice who voted with the majority had moved a reconsideration. Division Motion to Dismiss, Appendix B.

The decisions of this Court hold that the raising of a federal question for the first time in a rejected petition for rehearing is timely where the question is created by an unexpected decision of the highest state court which the appellant had no prior opportunity to assert. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930); *Missouri ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U. S. 313 (1930); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74 (1930).

The cases cited by appellees recognize this principle. Appellees have limited their attack to an argument that Levitt should have anticipated the decision of the New Jersey Supreme Court eliminating the definition of "publicly assisted housing accommodation" as set forth in N. J. S. A. 18:25-5(k). It is Levitt's position that the record in this case does not support appellees' argument and that the construction of the New Jersey Law Against Discrimination adopted by the New Jersey Supreme Court was not one urged by appellees nor was it the construction adopted by the intermediate appellate court.

The New Jersey Supreme Court held that the term "publicly assisted housing accommodation" as used in N. J. S. A. 18:25-4 was not limited in meaning to the definition set forth in N. J. S. A. 18:25-5(k) and that such definition set forth merely illustrations of the meaning of the phrase. It held that Levitt's housing came within the term as used in N. J. S. A. 18:25-4. Jurisdictional Statement, pp. 7a-18a. The court considered the possibility that a liberal interpretation of the word "financed" in N. J. S. A.

18:25-5(k) might include Levitt's housing but refused to place its decision on this ground. The court did not hold that a consideration of the provisions of N. J. S. A. 18:25-4 and 5(k) together, with the application of normal canons of construction of legislative language, gave a meaning to the term "publicly assisted housing accommodation" which would include Levitt's housing. The opinion of the New Jersey Supreme Court, fairly read, reveals that that court saw no need for the legislature's inclusion of Section 5(k) in the statute and in effect wrote that provision out of the statute in connection with any interpretation of "publicly assisted housing accommodation".

The opinion of the Appellate Division does not contain any indication of the reasoning followed by that court in reaching its conclusion which, with respect to the construction of the statute, is set forth in no more than two brief paragraphs. Jurisdictional Statement, pp. 32a-33a. The individual appellees have quoted the first paragraph at page 7 of their motion. The first sentence of the next paragraph clearly indicates that the court had not adopted a construction predicated solely upon an interpretation of the meaning of the phrase "publicly assisted housing accommodation" as set forth in N. J. S. A. 18:25-4. In this sentence, the court stated

> "We further hold that, as *N. J. S. A.* 18:25-4 and *N. J. S. A.* 18:25-5, *subd. k*, create and define the civil right involved, the Division is empowered by statute to 'enforce the laws of this State against discrimination in housing built with public funds or public assistance, *pursuant to any law.*' (Emphasis supplied) (*N. J. S. A.* 18:25-9.1)."

The argument of the Division in the Appellate Division was not that N. J. S. A. 18:25-4 covered Levitt's housing

without reference to the definition in N. J. S. A. 18:25-5(k) but that the *statute* covered all "publicly assisted housing".

The Division did not argue in its brief filed in the New Jersey Supreme Court that the phrase "publicly assisted housing accommodation" in N. J. S. A. 18:25-4 was applicable to Levitt's housing without reference to the definition in N. J. S. A. 18:25-5(k). Throughout its brief the Division consistently referred to the provisions of both N. J. S. A. 18:25-4 and 5(k). In Subsection A of its first point, which was devoted to the question of statutory construction, the Division argued that Levitt was the recipient of federal assistance and that such assistance brought it within the meaning of the term "publicly assisted housing accommodation" as used in the Law Against Discrimination. It referred to the provisions of both sections, arguing from *State* v. *Rosecliff Realty Co.*, 1 N. J. Super. 94 (App. Div. 1948), *cert. denied*, 1 N. J. 602 (1949), that the construction canon of *ejusdem generis* authorized the application of the statute to Levitt's housing and concluded this argument with the following statement:

> "We therefore submit that the statute is not open to construction. The plain and clear language means that 'all' public assistance of 'any' *associated* quality qualifies housing for coverage by the Law Against Discrimination." (Emphasis added.) (p. 22)

In Subsection B of this point, the Division argued that though Levitt's housing was not in fact financed by FHA insured mortgage loans, it should be so considered by the court and thus held to be within "the specific definition of N. J. S. A. 18:25-5(k)." (p. 22)

The individual appellees discussed the construction of the statute in Point IV of their brief and, like the Division, they subdivided their argument into one which urged that

Levitt as the beneficiary of federal assistance came within the meaning of the term "publicly assisted housing accommodation" as used in both N. J. S. A. 18:25-4 and 5(k) as well as one urging that Levitt's housing was in fact financed by federally insured mortgages.

The paragraph from their brief quoted in the middle of page 8 of their motion in this Court concluded with the following sentence:

> "We submit that plaintiffs' efforts to distort the natural meaning and intent of the term 'publicly assisted housing accommodation' in section 5k are contrary to the well settled canons of construction applicable to the case at bar enunciated by this Court." (p. 22)

They thereafter, at page 24, summarized the argument to be made in subsequent subsections of Point IV as follows:

> "Two separate propositions support placing the present proceedings in sections 4 and 5(k), each of which is stated in greater detail below: . . . ."

Levitt clearly understood that the arguments of both appellees supported a construction of "publicly assisted housing accommodation" as used in both N. J. S. A. 18:25-4 and 5(k) which would include Levitt's housing. The paragraph on page 23 of Levitt's brief from which the individual appellees, at page 9 of their motion, have extracted a portion of a sentence is as follows:

> "The Division's alternative argument is that plaintiffs' housing should be considered as included within the meaning of 'publicly assisted housing accommodation' as used in N. J. S. A. 18:25-4 and 5(k) because of plaintiffs' substantial connection with FHA in endeavoring to bring their housing within the regulations and requirements of FHA. In making

this argument the Division assumes that the legislative intent was to include all housing as to which there was any public assistance."

The statement in Levitt's brief quoted from page 24 was a reference to the Division's argument based upon *State* v. *Rosecliff Realty Co., supra.* Answering this argument, Levitt took the position that the term "publicly assisted housing accommodation" was a legislatively manufactured phrase and that the legislative definition thereof in N. J. S. A. 18:25-5(k) should be considered the absolute limit of meaning despite the use of the word "include" and that the canon of construction of *ejusdem generis* followed in *State* v. *Rosecliff Realty Co., supra,* should not be applied in this case.

The New Jersey Supreme Court adopted a broad construction of the New Jersey Law Against Discrimination which was one not urged by the appellees in this case. The court has not only ignored the legislative definition of the term but has effectively eliminated it from the statute for all practical purposes. This construction is not one which Levitt could reasonably have anticipated. Customary canons of statutory construction require a reading of all of the provisions of a statute in an effort to ascertain legislative intent. Argument to a court urging unconstitutionality of a statute on the assumption that certain provisions might be eliminated by a court in order to construe a statute more broadly would be profitless speculation. Litigants should not be required to anticipate that a court by construction will eliminate the definition section of a statute rather than attempt to accommodate the definition with the word defined.

The Division makes the further argument that Levitt has no standing to argue unconstitutionality of the New

Jersey Law Against Discrimination because of vagueness and indefiniteness in view of the fact that the New Jersey Supreme Court "has emphatically found that Levitt's operation is clearly covered". It suggests that Levitt is seeking to urge the constitutional objection of others.

It is obvious that, had the New Jersey Supreme Court held that Levitt's operations were not covered by the statute, Levitt would have no standing to litigate the construction of the statute on appeal. The holding that Levitt's housing is within the meaning of the term "publicly assisted housing accommodation", as used in N. J. S. A. 18:25-4, makes Levitt a person aggrieved. No amount of emphasis by a court so holding or statements to the effect that Levitt's housing is clearly covered deprives it of such standing to sue. This case is not like one in which a statute, after enumerating certain categories subject thereto, thereafter utilizes a general phrase to make it applicable to an indefinite group. In such a situation a person in one of the enumerated categories cannot urge the indefiniteness of the general phrase. Here, the New Jersey Supreme Court has not held that Levitt's housing is included in the categories in the definition of "publicly assisted housing accommodation" in N. J. S. A. 18:25-5(k) but has eliminated that definition from the statute, except for the purpose of illustration.

Acceptance of the Division's contention, that Levitt has no standing to urge this constitutional argument simply because it has been held by the court to be covered by the statute, would render the statute immune from constitutional attack by anyone.

Burstyn v. *Wilson*, 343 U. S. 495 (1952), demonstrates the absurdity of the position of the Division. In that case the distributor of a motion picture challenged the constitutional validity for inadequacy of standards of a state licensing statute denying a license to a motion picture found

to be "sacrilegious" by the licensing board. Having been denied a license because the local licensing board had held the motion picture sought to be licensed "sacrilegious" within the meaning of the statute, the distributor obtained review of this administrative agency action in the Appellate Division of the Supreme Court of New York on the ground, among others, that the term "sacrilegious" was so vague and indefinite as to offend due process. The adverse determination of the Appellate Division which was affirmed by the Court of Appeals of New York was appealed to this Court which took jurisdiction and reversed on the merits.

POINT III.

The question concerning the unconstitutionality of the Law Against Discrimination under Article VI, Clause 2 of the U. S. Constitution is a substantial federal question.

This Court's recent decision in *Huron Portland Cement Co. v. City of Detroit*, U. S. , 28 U. S. Law Week 4269 (April 25, 1960), is not authority for upholding the constitutional validity of the New Jersey Law Against Discrimination under the supremacy clause of the U. S. Constitution, Article VI, Clause 2. In that case, this Court held that a municipal smoke abatement ordinance could be validly applicable to vessels operating in interstate commerce pursuant to a federal license and subject to federal inspection statutes. There was in that case no conflict between the municipal police power regulation and federal safety regulations. It was held that the federal licensing of vessels did not exempt them from local regulation in the exercise of police power and that the interstate commerce nature of the vessels' operations did not preclude non-

discriminatory regulation which did not impose an undue burden on interstate commerce.

The instant case is not one involving non-conflicting concurrent federal and state regulation of a business enterprise which has no relationship with a federal program. In this case, the private enterprise sought to be regulated by the state has a relationship to the operation of a federal program instituted by Congress in the exercise of its constitutional power to provide for the general welfare. U. S. Constitution, Art. 1, §8.

The unconstitutionality of the New Jersey Law Against Discrimination is, on these facts, evident from that line of authority of which *Public Utilities Commission* v. *United States*, 355 U. S. 534 (1958), is the most recent decision of this Court. In *Public Utilities Commission* v. *United States*, as in this case, state regulation of a private enterprise affects a federal program because of the relationship between the private enterprise and the federal agency which is effectuating the Congressionally authorized program.

The interference with the federal program created by the application of the New Jersey Law Against Discrimination in this instance grows out of the conflict between the state regulation and repeated Congressional rejection of anti discrimination amendments to the National Housing Act of 1934.

In addition to conflicting with this Congressional policy, the New Jersey Law Against Discrimination seeks to regulate the activities of a federal agency which is already subject to the pervasive regulation imposed by the Fifth Amendment. A state may not legislatively regulate the operations of a federal agency by imposing obligations in an area already constitutionally regulated even though the state regulations may be identical.

Conclusion.

It is respectfully submitted that the appellees' Motions to Dismiss should be denied and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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